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No. 79-984

In the Supreme Court of the United States

OCTOBER TERM, 1979

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, LOCAL 433, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	3
Argument	7
Conclusion	13

CITATIONS

Cases:

Alexander Dawson, Inc. v. *NLRB*, 586 F.2d 1300	11
Barton Brands, Ltd. v. *NLRB*, 529 F.2d 793	8
Bleier v. *NLRB*, 457 F.2d 871	8
De Arroyo v. *Sindicato de Trabajadores Packinghouse*, 425 F.2d 281, cert. denied, 400 U.S. 877	8
Emporium Capwell Co. v. *Western Addition Community Organization*, 420 U.S. 50	8
Houston Typographical Union No. 87, 145 N.L.R.B. 1657	9
International Longshoremen's Union Local No. 13, 192 N.L.R.B. 260, reaff'd, 210 N.L.R.B. 952, enforced, 549 F.2d 1346..	12
International Longshoremen's Union Local No. 13, 183 N.L.R.B. 221, remanded, 80 L.R.R.M. 3213, order reaff'd, 210 N.L.R.B. 952	12

Cases—Continued

	Page
International Union of Operating Engineers Local 18, 204 N.L.R.B. 681, remanded, 496 F.2d 1308, reaff'd, 220 N.L.R.B. 147, enforcement denied, 555 F.2d 552	9
Kling v. *NLRB*, 503 F.2d 1044	8
Local 357, International Brotherhood of Teamsters v. *NLRB*, 365 U.S. 667	5
Local Union No. 12, United Rubber Workers v. *NLRB*, 368 F.2d 12, cert. denied, 389 U.S. 837	8
Millwrights' Local Union 1102, 144 N.L.R.B. 798	9
Miranda Fuel Co., 140 N.L.R.B. 181, enforcement denied, 326 F.2d 172	5, 7, 8, 9
NLRB v. *Deena Artware, Inc.*, 361 U.S. 398	12
NLRB v. *Duncan Foundry and Machine Works, Inc.*, 435 F.2d 612	11, 12
NLRB v. *H.E. Fletcher Co.*, 298 F.2d 594	11
NLRB v. *International Longshoremen's Ass'n Local 1581*, 489 F.2d 635, cert. denied, 419 U.S. 1040	8
NLRB v. *Local 485, International Union of Electrical Workers*, 454 F.2d 17	9
NLRB v. *Scenic Sportswear*, 475 F.2d 1226	11
NLRB v. *Thompson Transport Co.*, 421 F.2d 154	11
Owens-Corning Fiberglas Corp. v. *NLRB*, 407 F.2d 1357	11
Phelps Dodge Corp. v. *NLRB*, 313 U.S. 177	12

Cases—Continued

	Page
Radio Officers' Union v. *NLRB*, 347 U.S. 17	10
Tex Tan Welhausen Co. v. *NLRB*, 419 F.2d 1265	11
Truck Drivers and Helpers Local Union 568 v. *NLRB*, 379 F.2d 137	8
United Steelworkers of America, Local 5571 v. *NLRB*, 401 F.2d 434	12
Vaca v. *Sipes*, 386 U.S. 171	5, 7, 8

Statute:

National Labor Relations Act, 29 U.S.C. 151, *et seq.*	2
Section 8(b)(1)(A), 29 U.S.C. 158 (b)(1)(A)	2, 5, 6, 7, 9, 10
Section 8(b)(2), 29 U.S.C. 158(b)(2)	2, 5, 6, 8, 9, 10

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-19) is reported at 600 F.2d 770. The decision and order of the National Labor Relations Board (Pet. App. B-1 to B-80) are reported at 228 N.L.R.B. 1420.

JURISDICTION

The judgment of the court of appeals (Pet. App. C-1 to C-4) was entered on September 26, 1979. The petition for a writ of certiorari was filed on December 22, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly found that the Union violated Sections 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(A) and 158 (b)(2), by arbitrarily dispatching employees from its exclusive hiring hall to 76 jobs in disregard of its collective-bargaining agreement with various employers.

2. Whether the Board properly found that the Union violated Section 8(b)(1)(A) of the Act, 29 U.S.C. 158(b)(1)(A), by engaging in threats and acts of violence against employees or applicants for referral who protested the Union's unlawful operation of the hiring hall.

3. Whether the Board properly left for the compliance proceeding the determination of the identities of the discriminatees, where no individual discriminatee was identified at the unfair labor practice hearing.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151, *et seq.*, are set forth at Pet. 2-3.

STATEMENT

Petitioner ("the Union") has collective bargaining agreements with a number of multi-employer associations and individual employers who hire ironworkers (Pet. App. B-6 to B-8). The master contract to which they have agreed provides that ironworkers are to be hired according to Section 5 of the contract, which sets forth procedures for the distribution of available jobs (*id.* at B-8 to B-13). Employers are entitled to fill a certain proportion of their available jobs with ironworkers who have previously worked for them and whom they request by name through the Union hall; other jobs must be filled through "open orders" (*id.* at B-13 to B-14). When the procedure is properly followed, the Union's business agents call out each employer's order for ironworkers on a public address system at the hall (*id.* at B-13 to B-16). When an open order call is made, an applicant may bid on the job if he has a number on the out-of-work list maintained at the hall. The bid with the lowest number receives the job (*id.* at B-15).

From May of 1974 to March of 1975, the Union, in 76 instances, dispatched employees without adhering to the referral procedure set forth in the contract (Pet. App. B-23 to B-61). The improper dispatches —known as "backdooring" (*id.* at B-16)—took several forms: the Union agents dispatched individuals who were not on the out-of-work list; they filled open order calls as if the persons dispatched had been requested "by name" (thus preventing out-of-work list appli-

cants from bidding), and they dispatched employees without announcing the call orders at the hall, again, preventing eligible applicants from bidding (*id.* at B-16, B-23 to B-61).

The Union's business agents openly acknowledged the backdoor policy, and they engaged in threats and violence against applicants who questioned it (Pet. App. B-16 to B-23). For example, on February 13, 1975, applicant Lester Zink questioned Business Agent Joe Ward about a job referral. After a short discussion, Ward called Zink "a troublemaking son-of-a-bitch" and threatened to pound his head into the pavement (*id.* at B-19). A few days later, on February 19, 1975, applicant Gilbert C. Sims, in a conversation with Ward about the hiring hall, stated that someone would sue the Union if the backdoor practices continued. Ward cursed Sims and ordered him out of the hall, exclaiming "You're suing the Local and don't come back." He then pushed Sims to the floor, injuring Sims' back. Sims called the police and Ward was arrested (*id.* at B-19 to B-20). Approximately a year later, Sims was approached at the hiring hall by Business Agent Thomas Wagner, Executive Board Member Dwayne Duke, and two other ironworkers. One of the ironworkers told Sims that, if Sims were 20 years younger, the ironworker would "grind Sims up, put him in a rendering plant and do away with him." Duke added that they "had to get rid of all of those s-o-b's and the best thing to do would be to shoot Sims and the rest of the NLRB witnesses." Business Agent Wagner, who was in charge of the hall, listened

to the remarks with a smile and said nothing (*id.* at B-20).

2. The Board adopted the Administrative Law Judge's decision, which held that the Union violated Sections 8(b)(1)(A) and 8(b)(2) of the Act by operating its hiring hall in such a manner "as to deny applicants their right to fair representation" (Pet. App. B-71). The Administrative Law Judge found that the statements and actions of the Union's business agents, together with the 76 incidents of backdooring, were likely to give applicants for employment "a reasonable basis for believing that access to employment depended on securing the good will of the business agents rather than on the objective criteria of the hiring hall" and they "stood as a warning" to employees that such good will must be "nurtured and sustained" (*id.* at B-64, B-66). The Administrative Law Judge concluded that, by operating a hiring hall in this manner, with no legitimate employer or union purpose being served, the Union breached its duty of fair representation, citing *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), enforcement denied, 326 F.2d 172 (2d Cir. 1963); *Local 357, International Brotherhood of Teamsters* v. *NLRB*, 365 U.S. 667 (1961); and *Vaca* v. *Sipes*, 386 U.S. 171, 181 (1967) (Pet. App. B-62 to B-71).

The Board affirmed that finding and further found that "[a]lthough the threats and the act of violence [pertaining to applicants Zink and Sims] were not specifically alleged in the complaint to violate the Act, they are closely related to and indicative of the manner in which the hiring hall was operated and, there-

fore, fall within the general allegations of the complaint that [the Union] violated the Act by operating its hiring hall in an arbitrary, capricious, and unfair manner" (Pet. App. B-3).

The Board ordered the Union, *inter alia*, to cease and desist from the unfair labor practices found, to operate its exclusive hiring hall in a nondiscriminatory manner and in accordance with the provisions of its collective-bargaining agreement, and to make whole any individuals denied dispatch by the Union's unlawful operation of its hiring hall (Pet. App. B-3, B-73 to B-80). In fashioning the backpay portion of the remedial order, the Board adopted the Administrative Law Judge's conclusion that, although the individuals denied referrals were not as yet identified, the General Counsel should have the opportunity to identify the discriminatees at the backpay hearing (*id.* at B-1, B-73 to B-76).

3. The court of appeals sustained the Board's findings and conclusions, and enforced its order. The court agreed that "the natural and foreseeable consequences of a system by which the Union's agents arbitrarily dispensed their patronage was to encourage loyalty of the job applicants to the Union," and that by "openly backdooring referrals in violation of the agreement" and threatening and committing violence against applicants who objected, the Union violated Sections 8(b)(1)(A) and 8(b)(2) of the Act (Pet. App. A-11 to A-12). The court also agreed that the Union violated Section 8(b)(1)(A) of the Act by engaging in threats and acts of violence against

workers opposing the Union's hiring hall practices. The court found that the issue was "fully and fairly litigated" and that "the Board's position that the acts and threats of violence were within the general language of the complaint is reasonable" (Pet. App. A-8 to A-9). Finally, the court agreed that the Board "acted in its discretion" in deferring the issue of the identity of the discriminatees to the post-enforcement compliance proceeding (*id.* at A-13 to A-18).

ARGUMENT

1. The Union offers no justification for its backdooring practices, nor does it deny that its conduct was arbitrary and a breach of its duty of fair representation. Rather, it contends (Pet. 5-6) that, because its backdooring "did not bear any relationship to union participation or non-participation," its conduct could not be found to violate the Act. There is no merit to that contention.

a. As this Court stated in *Vaca* v. *Sipes*, 386 U.S. 171, 177 (1967), it has long been recognized that a union has a statutory duty to represent fairly all employees in a bargaining unit "both in its collective bargaining * * * and in its enforcement of the resulting collective bargaining agreement * * *." In *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), enforcement denied, 326 F.2d 172 (2d Cir. 1963), the Board first ruled that a union's breach of its duty of fair representation by arbitrary conduct also constitutes an unfair labor practice under Section 8(b)(1)(A) of the Act, whether or not the union

conduct related directly to the employee's union membership or activities. The Board's *Miranda Fuel* ruling has been expressly adopted by the Fifth, Seventh, Ninth and District of Columbia Circuits,[1] and has been cited with apparent approval by the First and Third Circuits.[2] Moreover, this Court assumed the validity of the *Miranda Fuel* doctrine in *Vaca* v. *Sipes*, *supra*, when it held that a union member's claim of breach of the duty of fair representation in connection with the union's handling of his grievance could be considered judicially even though the conduct might also have been an unfair labor practice within the Board's jurisdiction under *Miranda Fuel*. See also *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50, 64 (1975).

Although the Second Circuit declined to enforce the Board's order in *Miranda Fuel*, 326 F.2d 172, that decision was issued 17 years ago, before the

[1] *NLRB* v. *International Longshoremen's Ass'n Local 1581*, 489 F.2d 635 (5th Cir.), cert. denied, 419 U.S. 1040 (1974); *Local Union No. 12, United Rubber Workers* v. *NLRB*, 368 F.2d 12, 17 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967); *Kling* v. *NLRB*, 503 F.2d 1044, 1046 (9th Cir. 1975); *Truck Drivers and Helpers Local Union 568* v. *NLRB*, 379 F.2d 137, 141-142 (D.C. Cir. 1967). In *Barton Brands, Ltd.* v. *NLRB*, 529 F.2d 793, 798-800 (7th Cir. 1976), the Seventh Circuit endorsed the view that such arbitrary conduct by a union may violate Section 8(b)(2) of the Act. See pages 9-10, *infra*.

[2] *De Arroyo* v. *Sindicato de Trabajadores Packinghouse*, 425 F.2d 281, 287 (1st Cir.), cert. denied, 400 U.S. 877 (1970); *Bleier* v. *NLRB*, 457 F.2d 871, 872-873 (3d Cir. 1972).

Board's theory gained acceptance in other circuits, and the Second Circuit has never reconsidered the issue. See *NLRB* v. *Local 485, International Union of Electrical Workers*, 454 F.2d 17, 21 n.6 (2d Cir. 1972). Moreover, only one member of the *Miranda Fuel* panel concluded that arbitrary conduct which is in breach of the duty of fair representation does not violate the Act. Chief Judge Lumbard and Judge Friendly found no need to reach the validity of the Board's conclusions concerning Section 8(b)(1)(A) because they disagreed with the Board's factual finding; and Judge Friendly, dissenting, would have sustained the Board's Section 8(b)(2) finding.[3]

b. Moreover, the court of appeals found (Pet. App. A-11 to A-12) that "the natural and foreseeable consequences of [the] system by which the

[3] The cases relied on by the Union (Pet. 7) for the proposition that the Board has shown confusion on this issue do not support that assertion. In *International Union of Operating Engineers Local 18*, 204 N.L.R.B. 681 (1973), remanded 496 F.2d 1308 (6th Cir. 1974), reaff'd, 220 N.L.R.B. 147 (1975), enforcement denied, 555 F.2d 552 (6th Cir. 1977), the issue was whether the union's denial of seniority on a hiring hall list to a member who was disruptive in the hall and at a union meeting was necessary for the effective functioning of the union and therefore permissible. In *Millwrights' Local Union 1102*, 144 N.L.R.B. 798, 801 & n. 4 (1963), the Board cited *Miranda Fuel, supra*, but found that the Union's conduct there was not "guided by arbitrary or irrelevant considerations, inconsistent with its duty to represent all in the bargaining unit fairly." Similarly in *Houston Typographical Union No. 87*, 145 N.L.R.B. 1657, 1664 (1964), the Board found that the Union was not "guilty of unfair representation or invidious discrimination * * * within the meaning of the *Miranda* principle * * *."

Union's agents arbitrarily dispensed their patronage was to encourage loyalty of the job applicants to the Union and its agents." The court's holding that, in such circumstances, "[n]o specific intent to discriminate on the basis of union membership need be shown" to establish a violation of Section 8(b)(2) of the Act is plainly correct. *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 44 (1954). This is no reason for further review by this Court.

2. The Board found (Pet. App. B-2 to B-3) that the Union violated Section 8(b)(1)(A) of the Act by engaging in threats and acts of violence against applicants opposing the Union's referral practices. The Union does not object to the finding on substantive grounds, but rather argues (Pet. 9-11) that the finding is based on "background material" and, therefore, "cannot become the basis for a substantive finding of a violation" of the Act. The Administrative Law Judge (Pet. App. B-16 to B-23) used the information pertaining to the Union's threats and acts of violence against workers opposing the Union's referral practices to put "specific instances of backdooring into perspective." The Board, however, concluded (*Id.* at B-3) that, although not specifically alleged in the complaint, the Union's actions "are closely related to and indicative of the manner in which the hiring hall was operated and, therefore, fall within the general allegation of the complaint." The court of appeals agreed. It found that the threats and acts of violence "were as much a part of the unfair operation of the hiring hall as the improper

referral practices" (Pet. App. A-9). It further found (*ibid.*) that "the issue of threats and violence [was] fully and fairly litigated." In such circumstances, as the court of appeals correctly held, the Board properly may find a violation of the Act and issue an appropriate remedial order. *Alexander Dawson, Inc.* v. *NLRB*, 586 F.2d 1300, 1304 (9th Cir. 1978).[4]

3. Contrary to the Union (Pet. 9), the Board and the General Counsel did not "concede that it is impossible to identify alleged discriminatees," nor was this an issue that was "decided adversely" to the General Counsel. Rather, the Board found that, although the 76 employees who did not get referrals because of the backdooring were not identified at the hearing, the General Counsel should be afforded an opportunity to do so at the compliance stage. In so holding, the Board noted (Pet. App. B-75) that the problem of identification here was "somewhat limited." The court agreed, observing that (Pet. App. A-16 to A-17) "[t]he Union's out-of-work list will identify the applicants who were eligible for referral when the Union backdoored these

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[4] Accord: *Owens-Corning Fiberglas Corp.* v. *NLRB*, 407 F.2d 1357, 1361 (4th Cir. 1969); *Tex Tan Welhausen Co.* v. *NLRB*, 419 F.2d 1265, 1269-1270 (5th Cir. 1969); *NLRB* v. *Scenic Sportswear*, 475 F.2d 1226, 1227 (6th Cir. 1973); *NLRB* v. *Duncan Foundry and Machine Works, Inc.*, 435 F.2d 612, 615-616 (7th Cir. 1970); *NLRB* v. *Thompson Transport Co.*, 421 F.2d 154, 155 (10th Cir. 1970).

NLRB v. *H.E. Fletcher Co.*, 298 F.2d 594, 600 (1st Cir. 1962), on which the Union relies (Pet. 11), is not to the contrary. There the court found that the violation was neither "charged in the complaint nor litigated at the hearing."

jobs." The court also noted (Pet. App. A-17) that the Union will be given the opportunity to contest any backpay claim during the compliance proceeding and, if it so desires, upon judicial review of the Board's determination.

This procedure reflects the public policy that workers should be made "whole for losses suffered on account of an unfair labor practice" (*Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197 (1941)), and, as the court of appeals found (Pet. App. A-17), occasions "no unfairness to the Union." Other circuits have held that the issue of the identification of discriminatees is "properly considered in the compliance stage of the case, after the question of discrimination has been definitively settled." *NLRB* v. *Duncan Foundry and Machine Works, Inc.*, 435 F.2d 612, 616 (7th Cir. 1970); *United Steelworkers of America Local 5571* v. *NLRB*, 401 F.2d 434, 437-438 (D.C. Cir. 1968).[5] And see *NLRB* v. *Deena Artware, Inc.*, 361 U.S. 398, 411 (1960) (Frankfurter, J., concurring). Use of that procedure here was plainly proper and raises no issue warranting consideration by this Court.

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[5] Where the number or identity of the employees discriminated against cannot be identified, the Board will not authorize such a remedy. Compare *International Longshoremen's Union Local No. 13*, 183 N.L.R.B. 221, 229 (1970), remanded, 80 L.R.R.M. 3213 (9th Cir. 1972), order reaff'd, 210 N.L.R.B. 952 (1974) (cited at Pet. 8-9) with *International Longshoremen's Union Local No. 13*, 192 N.L.R.B. 260, 264 (1971), reaff'd, 210 N.L.R.B. 952, 953 (1974), enforced, 549 F.2d 1346, 1355 (9th Cir. 1977).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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